IN THE HIGH COURT OF JUDICATURE, ANDHRA PRADESH
AT HYDERABAD

(Special Original Jurisdiction)

FRIDAY, THE TWENTY SEVENTH DAY OF AUGUST
TWO THOUSAND AND FOUR

PRESENT

THE HON'BLE MR JUSTICE BILAL NAZKI

and
THE HON'BLE MR JUSTICE P.S.NARAYANA

WRIT PETITION NO : 23025 of 2002

Between:

B.M. Malani s/o Mohanlal Malani, aged 65 years, occ: business r/o 1-11-219, Begumpet, Hyderabad

..... PETITIONER

AND

1. The Income Tax Department, represented by its Commissioner, Bashirbagh, Hyderabad;
2. The Income Tax Officer, Ward No. 10 (1), Government of India, Hyderabad;
3. Unit Trust of India, represented by the Branch Manager, Chennai.

.....RESPONDENTS

Petition under Article 226 of the constitution of India praying that in the circumstances stated in the Affidavit filed herein the High Court will be pleased to issue a writ, order or direction in the nature of Mandamus or otherwise declaring that the action of the 2nd respondent in invoking the powers under Section 226 (3) of the Income Tax Act and attaching the petitioner's units and the further action of the 3rd respondent in resorting to distress sale of the petitioner's units which were attached by the 2nd respondent under his proceedings dt. 8.3.2002 is illegal, arbitrary and ultra vires the powers of the respondent and consequently direct the respondents, particularly the 3rd respondent to restore the petitioner's units by its face value and/or deposit the difference of value of Rs.21.31 lakhs to the petitioner's account with interest at such rate as this Hon'ble Court deems fit and proper together with

dividends from the date of attachment including costs of this writ petition.

Counsel for the Petitioner: MR.VILAS V.AFZULPURKAR

Counsel for the Respondent No.1 and 2: MR.J.V.PRASAD

Counsel for the respondent No.3: Mr. Ch. Ramesh Babu,

The Court made the following :

HON'BLE MR. JUSTICE BILAL NAZKI

AND

HON'BLE MR. JUSTICE P.S. NARAYANA

W.P.NO. 23025 OF 2002

ORDER: (Per Hon'ble Mr. Justice Bilal Nazki)

A short question is involved in this writ petition. The petitioner is an assessee of the Income Tax Department. For the assessment years 1988-89 and 1990-91 to 1995-96 pursuant to the orders dated 2.12.1999 the 2nd respondent determined the tax at Rs.1,76,80,735/- payable by the petitioner to the department. A demand notice was issued on 11.2.2000 to the petitioner asking him to pay the tax by 12.4.2000. The demand notice contained certain mistakes and on an application filed by the petitioner, the notice was rectified by the 2nd respondent on 8.3.2002 and the tax was revised to Rs. 157.77 lakhs. The petitioner contended that he had disposed of some properties in 1998 and invested sale proceeds in a sum of Rs.65.00 lakhs with the 3rd respondent in the units of Monthly Income Plan 1998-III under Capital Gains Scheme and had sought exemption under Section 54 EA of the Income Tax Act (for short "IT Act"). The said units were transferable after three years of deposit i.e., in September, 2001 on face value of Rs.10/- per unit. The said units could also be redeemed by the 3rd respondent at Rs.10/- per unit after five years i.e., in September, 2003. The said amount of Rs.65.00 lakhs was, therefore,

fully secured under the said units with the 3rd respondent. Since there was some time for maturity of the units, the petitioner had sought time for payment of tax till September, 2001 from Income Tax Settlement Commissioner, Chennai. Once again he moved an application on 4.2.2002 before the Settlement Commissioner seeking extension of time till 31.5.2002. Along with the application he deposited an amount of Rs.25.00 lakhs on 31.1.2002 to prove his bonafides. As such the total deposits made by the petitioner was Rs. 92.04 lakhs upto October, 2000. On 31.1.2002 he made further deposit of Rs.25.00 lakhs. The total amount deposited by him was Rs.117.04 lakhs. Only a balance of Rs.40.73 lakhs was due and the petitioner had the units in the face value of over Rs.65.00 lakhs. He was waiting for the orders of the Settlement Commissioner on the application made by him on 4.2.2002. In the meantime, it appears, the 2nd respondent issued attachment proceedings under Section 226 (3) of the Income Tax Act on 8.2.2002 and the units of the petitioner with the 3rd respondent were attached. The petitioner was neither aware of the same nor was given any notice. It was only on 15.2.2002 that the 2nd respondent addressed a separate notice to the petitioner informing him of the attachment of the units. The said notice and the attachment of the petitioner's units was in the nature of garnishee order to the 3rd respondent. It is further contended that even if it is assumed that the attachment made by the 2nd respondent was valid, the 3rd respondent was merely obliged to hold the money that would become due to the petitioner on the said units and since the said units were under the lock-in period under the Capital Gains Scheme and were within the hold and control of the 3rd respondent, he could not have sold them. It is further contended that it was a matter of record that on account of mismanagement and change in policy of Unit Trust of India, the face value per unit had fallen to Rs.7.00 per unit in September, 2001 as against Rs.10.00 and the said market value of the units was not improved thereafter. The petitioner was, therefore, hoping to redeem the said units at the face value of

Rs.10.00 and he requested the Settlement Commissioner to extend the time for payment of balance amount till 31.5.2002. It is contended that the petitioner's units in the hands of 3rd respondent were only attached by the 2nd respondent under Section 226 (3) of the Income Tax Act. The 3rd respondent on his own resorted to unauthorized distress sale of the units of the petitioner and thereby the petitioner incurred loss of Rs.3.07 ps. per unit. The action of the 3rd respondent in resorting to sale of the units was wholly unwarranted, unauthorized and without notice and consent of the petitioner. The original records pertaining to the units remained with the petitioner. The proceedings issued by the 2nd respondent seeking attachment under Section 226 (3) of the Income Tax Act did not warrant the 3rd respondent to resort to distress sale of the petitioner's units in such a hasty manner. The petitioner had invested Rs.65.00 lakhs with the 3rd respondent. The petitioner was also receiving the dividends on the units annually at Rs.8,12,500/- being 12.5% free from income tax and as such besides having loss of Rs.21.31 lakhs because of the sale of his units, the petitioner has also suffered loss of income at Rs.8.12 lakh per annum by way of dividends. The petitioner also challenged the order by which some interest was levied on him.

Section 226 (3) (i) of the Income Tax Act lays down,

> "(i) The (Assessing) Officer (or Tax Recovery Officer) may, at any time or from time to time, by notice in writing require any person from whom money is due or may become due to the assessee or any person who holds or may subsequently hold money for or on account of the assessee, to pay to the (Assessing) Officer (or Tax Recovery Officer) either forthwith upon the money becoming due or being held or at or within the time specified in the notice (not being before the money becomes due or is held) so much of the money as is sufficient to pay the amount due by the assessee in respect of arrears or the whole of the money when it is equal to or less than that amount."

A perusal of Section 226 (3) (i) of the IT Act shows that the proceedings under this provision are in the nature of garnishee proceedings. Attachment of a debt would mean that a creditor would reach money due from a third party to the debtor. The money should be either due or it should become due to the assessee or any person who holds or may subsequently hold money for or on account of the assessee. So the prerequisite for exercise of power under Section 226 (3) of the IT Act is that the person to whom the notice under this section is issued should be holding money on behalf of assessee or it should become due to him some time in future. What was attached under the impugned notice by the Income Tax Officer was not money, but were the units held by the assessee with the 3rd respondent. These units were transferable units and their value had not become due to the assessee on the day the notice was given. Thus, in our opinion, no money was due to the assessee from 3rd respondent at the time of the impugned notice, it would have become due on maturity of the units. Therefore, the whole exercise was illegal. The 3rd respondent purchased the units held by the assessee prematurely without his permission, transferred the units to himself on a value decided by him and submitted some money to the Income Tax Department. That is not the purport of Section 226 (3) of the Act. Even the Income Tax Department in its counter-affidavit stated that though the units have been attached, the UTI ought to have obtained the consent of the petitioner before sale and as such the loss, if any, on account of sale cannot be attributed to the 2nd respondent.

In the counter-affidavit filed by the 3rd respondent-UTI it has been stated in para 5 (ii),

> "In reply to Para-4, I submit that the investment made by the petitioner in the Monthly Income Scheme (98) (III) under Capital gain exemption and the unit holder can transfer the units purchased after 3 years and the repurchase price will be based on the Net Asset Value (NAV) of the scheme on the units. Hence the contention of the petitioner that the units held by him will be transferable after 3 years of deposit at par on face value

of Rs.10/- per unit is not correct and is hereby denied. As a matter of fact the units held by the petitioner under the scheme can be redeemed at par @ 10/- per unit after completion of 5 years but not otherwise. Hence all the adverse allegations made in Para-4 are hereby denied."

In any case the redemption value of the units was Rs.10/- per unit after five years, therefore the petitioner is entitled to face value of Rs.10/- per unit as admittedly five years have passed from the date of investment.

In the result, the transfer of units of the petitioner to UTI by the 3rd respondent is quashed. Since the tax has already been paid, therefore in the interest of justice, we direct the 3rd respondent to calculate the face value of the units of the petitioner at Rs.10/- per unit and pay the difference to the petitioner. The writ petition is accordingly disposed of. No costs.

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BN J.

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PSN J.

Dt. 27.8.2004

KR

Sd/-

Asst. Registrar

//true copy//

Section Officer

One Fair copy to the Hon'ble Mr. Justice Bilal Nazki (for his Lordship's kind perusal)

One Fair copy to the Hon'ble Mr. Justice P.S. Narayana (for his Lordship's kind perusal)

To

1. The Income Tax Department, represented by its Commissioner, Bashirbagh, Hyderabad;

2. The Income Tax Officer, Ward No. 10 (1), Government of India, Hyderabad;

3. Unit Trust of India, represented by the Branch Manager, Chennai.

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6. The Secretary, A.P. Advocates' Association Library, High Court Buildings, Hyderabad.

7. 2 CCs to J. V. Prasad, Standing Counsel for Income Tax Department, High Court buildings, Hyderabad.

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